

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PAUL HUNT</b>	)	
Claimant	)	
VS.	)	
	)	
<b>McDONALD'S OF PAOLA, KANSAS</b>	)	Docket No. 192,487
Respondent	)	
AND	)	
	)	
<b>KANSAS RESTAURANT &amp; HOSPITALITY ASSOCIATION SELF-INSURANCE FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and claimant have both appealed from the Award entered by Administrative Law Judge Robert H. Foerschler on March 5, 1997. The Appeals Board heard oral argument on August 27, 1997.

**APPEARANCES**

Claimant appeared by his attorney James L. Wisler of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney Brian J. Fowler of Kansas City, Missouri.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ awarded a work disability of 43.5 percent based upon a 31 percent wage loss and a 66 percent loss of ability to perform tasks less a 5 percent preexisting impairment. Claimant contends the percentage difference between the post- and pre-injury wage is higher than that found by the ALJ. Respondent, on the other hand, concludes that claimant should be treated as earning wages that are 90 percent or greater than the pre-injury wage and on that basis should be limited to functional impairment. Finally, respondent argues that if work disability is awarded, it should be less than that found by the ALJ.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the ALJ should be modified. Claimant is awarded benefits for a 39 percent work disability.

This claim concerns a back injury claimant suffered on July 12, 1994, while unloading a truck as a part of his duties for respondent. The key question in this claim is the percentage difference between the post- and pre-injury wages. If claimant earned a wage after the injury which was 90 percent or greater than his pre-injury wage, his disability is by law limited to the functional impairment. He is not entitled to a higher work disability. K.S.A. 44-510e. The parties disagree about the post- and pre-injury wage in this case primarily because they disagree about how the overtime should be treated.

Before the back injury, claimant earned \$6 per hour for 40 regular hours per week as a maintenance worker. Claimant also worked, at his own request, substantial amounts of overtime. The ALJ found claimant earned, and the Board agrees, an average of \$93.17 per week in overtime during the 26 weeks preceding his accident. The \$93.17 in overtime added to \$240 in base pay yields an average weekly wage of \$333.17, which the Board finds was claimant's average weekly wage on the date of accident computed in accordance with K.S.A. 44-511.

After the injury, claimant was off work for approximately one year. When he returned to work, claimant first attempted to do the maintenance job. Claimant had difficulty doing the work and respondent moved him to a grill cook job. As a grill cook, claimant initially worked some overtime. Claimant then asked not to work overtime, and beginning in June 1996 respondent did not assign additional overtime.

Respondent argues the award in this case should be limited to functional impairment because claimant earned or should be considered to have earned a wage 90 percent or greater than his pre-injury wage. Respondent relies on K.S.A. 44-510e as construed in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). K.S.A. 44-510e sets out the two factors to be given equal weight in measuring work disability: (1) task loss and (2) wage loss. The statute then provides that a claimant

is not entitled to work disability and is limited to an award based on functional impairment if he/she earns a post-injury wage which is 90 percent or more of the pre-injury wage. In Foulk, the Court ruled that if a claimant is, after the injury, offered a job he/she could perform but refuses to even attempt it, the wage in the offered job will be imputed to the claimant. The Copeland decision applied similar considerations where the claimant is not offered a job but refuses to make a good faith effort to find work. Then a reasonable wage will be imputed to the claimant based on what the evidence shows claimant could earn. In either case, if the imputed wage is 90 percent or greater than the pre-injury wage, the award would be limited to functional impairment. Respondent asks the Board to apply the rationale of the Foulk and Copeland decisions here.

Although respondent does not emphasize the point, respondent first notes some testimony in the record suggesting claimant could have, after the injury, returned to his duties as a maintenance worker. Specifically, Charles Gray, owner/operator of the McDonald's where claimant worked, testified he felt claimant could perform those duties. But the Board finds claimant would not have been able to perform those duties without accommodation. Claimant attempted the work and felt he could not do it. The duties, as described in the record, would have required more lifting than the medical evidence indicates claimant should do. Mr. Gray acknowledges that accommodation would have been required. And while Mr. Gray testified he could have allowed the necessary accommodation, there is no indication in the record claimant was offered accommodated work. The Board finds the wage in the maintenance job should not be imputed to claimant.

As indicated, the key dispute in this case relates to how the overtime pay should be considered in determining the post- and pre-injury wage. Respondent asserts that it is unfair in this case to consider the overtime. Mr. Gray testified claimant was given overtime before the injury only because claimant had requested the overtime to help with financial difficulties he was having at the time. Respondent agreed to allow claimant the overtime on a temporary basis to help claimant out. Respondent argues it should not now be penalized.

As to post-injury overtime, respondent argues claimant is, in effect, manipulating the system by asking not to work overtime. The result is a much higher percentage difference in the post- and pre-injury wages. On the basis of these considerations, respondent urges the Board to use the hourly wage only. Claimant earned \$6 per hour before the injury and \$5.40 after the injury. Respondent asks that the award be limited to functional impairment because the \$5.40 per hour post-injury is 90 percent of the \$6 pre-injury wage.

While the facts of the present case make a compelling argument for respondent's position, the Board can agree only in limited part. The statutory definition of the wage loss component of work disability, found in K.S.A. 44-510e, uses the phrase "average weekly wage" to describe the wage component:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. (Emphasis added.)

The methods for calculating average weekly wage are set out in K.S.A. 44-511. For an hourly employee, the calculation includes the average overtime for the 26 weeks preceding the accident. The statute makes no exceptions for circumstances where, as here, the overtime is unusually high or, on the other hand, situations where the overtime may be unusually low during that 26-week period. In all cases, the measure is the 26 weeks preceding the accident. In this case, the result is a pre-injury average weekly wage of \$333.17.

The limited part of respondent's position with which the Board can agree concerns the post-injury wage. The evidence indicates claimant likely would have continued to earn some overtime after the accident but chose not to do so. In this case, the refusal to work overtime is analogous to the refusal to accept employment discussed in Foulk. Claimant worked substantial amounts of overtime before the accident, claimant has no medical restriction against working overtime, and claimant has offered no explanation for not working overtime. With these circumstances in mind, the Board concludes claimant's post-injury wage should be calculated by excluding from the calculation the period after claimant asked not to work overtime.

As with the pre-injury wage, the record includes two sets of records, one introduced at the regular hearing and a second introduced in the deposition of Mr. Gray. For the pre-injury wage, the records show essentially the same wage. For the post-injury wage, the records cover a different period, with those sponsored by Mr. Gray's testimony being the most recent. The post-injury wage summaries overlap and differ for the pay period ending December 24, 1995. The Board finds those introduced by Mr. Gray most likely accurate. The Board also considers it appropriate to use the more recent summary, that with Mr. Gray's testimony, but excluding the weeks after June when claimant worked no overtime. Calculating from December 24, 1995, through May 26, 1996, the Board finds claimant averaged 5.43 hours or \$43.98 ( 5.43 hours times \$8.10) per week in overtime pay. The overtime added to \$216 per week in base pay gives a post-injury wage of essentially \$260.

The Board, therefore, finds claimant's post-injury wage (\$260) is 22 percent less than the pre-injury wage (\$333.17). The Board also notes respondent has suggested at oral argument that claimant has or may receive a pay raise. The record contains no evidence of such a raise and, therefore, none has been considered.

Claimant argued in his brief for different post- and pre-injury wages, both higher than that found by the ALJ, and for a higher percentage difference between the two. Claimant's counsel abandoned this argument at the time of the hearing in this case. The Board finds the pre-injury wage calculated by the ALJ to be correct. For the reasons stated above, the Board has found a post-injury wage different from that found by the ALJ but also different from that suggested in claimant's brief.

The Appeals Board agrees with the ALJ's finding that claimant suffered a 66 percent loss of ability to perform tasks he had performed in the 15 years of work prior to the date of accident. This finding is based upon the opinion of Dr. John A. Pazell, the only physician who gave a task loss opinion. As noted, K.S.A. 44-510e requires that the task loss be "in the opinion of the physician." Dr. Pazell adopted the opinion of Michael J. Dreiling. Dr. Pazell also agreed that he would adopt the credible opinion expressed by any vocational expert. From this, respondent argues for use of the task loss opinion of Mary Titterington. Ms. Titterington's opinions were not, however, adopted by a physician and the Board has not construed Dr. Pazell's comments to be an approval of Ms. Titterington's task loss opinions.

Finally, respondent asserts that Mr. Dreiling changed his opinion of the task loss. The Board does not agree. Mr. Dreiling acknowledged that the tasks might be counted differently. But he did not fundamentally change his opinion from the 66 percent task loss based upon the restrictions by both Dr. Vito J. Carabetta, the independent medical examiner, and the restrictions of Dr. Pazell.

The Board, therefore, finds claimant has a 44 percent work disability based on a 66 percent task loss and a 22 percent wage loss. The Board agrees, based on Dr. Carabetta's opinion, that claimant had a 5 percent preexisting functional impairment which is to be deducted in accordance with K.S.A. 44-501(c). Claimant is, therefore, entitled to benefits based upon a work disability of 39 percent.

### **AWARD**

**WHEREFORE**, the Appeals Board finds that the Award by Administrative Law Judge Robert H. Foerschler, dated March 5, 1997, should be, and the same is hereby, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Paul Hunt, and against the respondent, McDonald's of Paola, Kansas, and its insurance carrier, Kansas Restaurant & Hospitality Association Self-Insurance Fund, for an accidental injury which occurred July 12, 1994, and based upon an average weekly wage of \$333.17 for 52 weeks of temporary total disability compensation at the rate of \$222.12 per week or \$11,550.24, followed by 147.42 weeks at the rate of \$222.12 per week or \$32,744.93, for a 39% permanent partial work disability, making a total award of \$44,295.17.

As of March 31, 1998, there is due and owing claimant 52 weeks of temporary total disability compensation at the rate of \$222.12 per week or \$11,550.24, followed by 142 weeks of permanent partial compensation at the rate of \$222.12 per week in the sum of \$31,541.04 for a total of \$43,091.28, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,203.89 is to be paid for 5.42 weeks at the rate of \$222.12 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James L. Wisler, Topeka, KS  
Brian J. Fowler, Kansas City, MO  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director